Sheet Metal Workers International Association, Local Union No. 13, AFL-CIO (Sheet Metal Contractors Association, Hudson & Bergen Counties, New Jersey) *and* Paul Mirable. Case 22-CB-4378

November 23, 1981

DECISION AND ORDER

BY CHAIRMAN VAN DE WATER AND MEMBERS JENKINS AND HUNTER

On August 20, 1981, Administrative Law Judge D. Barry Morris issued the attached Decision in this proceeding. Thereafter, both Respondent and the Charging Party filed exceptions and supporting briefs, and Respondent filed an answering brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions[2] of the Administrative Law Judge and to adopt his recommended Order, as modified herein.[3]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Sheet Metal Workers International Association, Local Union No. 13, AFL-CIO, Union, New Jersey, its officers, agents, and representatives, shall take the action set forth in the said recommended Order, as so modified:

1. Substitute the following paragraph as paragraph 1(c):

"(c) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act."

2. Substitute the attached notice for that of the Administrative Law Judge.

[1] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

[2] In accordance with his dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980), Member Jenkins would award interest on the backpay due based on the formula set forth therein.

[3] We have modified the Administrative Law Judge's recommended Order and notice to conform to the statutory language.

APPENDIX

NOTICE TO MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT refuse to refer nonmembers to jobs through our exclusive hiring hall.

WE WILL NOT demand the payment of back dues for periods when dues were not validly required as a condition of employment, as a requirement for reinstatement into membership and referral through our hiring hall.

WE WILL NOT in any like or related manner restrain or coerce employees in the exercise of the rights guaranteed them in Section 7 of the Act.

WE WILL make whole Paul Mirable for any loss of earnings, plus interest, he may have suffered as a result of our refusal to refer him to work and WE WILL reimburse him for the back dues, which we required him to pay.

SHEET METAL WORKERS INTERNATIONAL ASSOCIATION, LOCAL UNION NO. 13, AFL-CIO

DECISION

STATEMENT OF THE CASE

D. BARRY MORRIS, Administrative Law Judge: This case was heard before me in Newark, New Jersey, on April 30, May 1, 18, and 19, 1981. The charge was filed on June 27, 1980, and the complaint was issued on September 26, 1980, alleging that Sheet Metal Workers International Association, Local Union No. 13, AFL-CIO (Respondent), violated Section 8(b)(1)(A) and (2) of the National Labor Relations Act, as amended (the Act). Respondent filed an answer denying the commission of the alleged unfair labor practices.

The parties were given full opportunity to participate, produce evidence, examine and cross-examine witnesses, argue orally, and file briefs. Briefs were filed by all parties.

Upon the entire record of the case, including my observation of the witnesses, I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF THE ASSOCIATION

Sheet Metal Contractors Association, Hudson & Bergen Counties, New Jersey (the Association), a New Jersey corporation with its principal offices in New Jersey, is an association of employers whose members are engaged in the business of building construction in New Jersey. For many years the employer-members of the Association have delegated to it the authority to conduct collective-bargaining negotiations on their behalf

and to enter into a collective-bargaining agreement. During the 12 months preceding the issuance of the complaint, the employer-members of the Association purchased goods valued in excess of $50,000 from suppliers in other States for delivery within New Jersey.

The complaint alleges, the answer admits, and I find that the Association is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The complaint alleges, the answer admits, and I find that Respondent is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Issues*

The complaint alleges that beginning December 30, 1979,[1] Respondent refused to refer Paul Mirable to work from its exclusive hiring hall because he was not a member of Respondent. The complaint also alleges that on June 24, 1980, Respondent required Mirable, as a condition precedent to reinstatement, to pay back dues for the period following September 24, when Mirable was not a member of Respondent. Respondent denied the allegations. The issues are:

(1) Did Respondent refuse to refer Mirable to work from its exclusive hiring hall because he was not a member of Respondent; and

(2) Did Respondent require Mirable to pay back dues as a condition precedent to reinstatement to membership in Respondent and referral from its hiring hall.

B. *The Facts*

1. Background

Mirable, a journeyman sheet metal worker, has been a member of Respondent for approximately 13 years. Respondent is a party to a collective-bargaining agreement with the Association, the most recent of which was effective from July 1, 1978, through June 30, 1981. The collective-bargaining agreement provides for an exclusive job referral system whereby all sheet metal workers to be employed by the employer-members of the Association must be referred by Respondent.

During August, Mirable worked for several days at a job in Ithaca, New York. The job was under the jurisdiction of Local 112 in Elmira. As a result of that job, Mirable was brought up on charges by Local 112, was found guilty and fined $1,000 by Local 112, and was expelled from membership in the International. Thereafter, Mirable appealed to the International but his appeal was denied as being untimely.

During the pendency of the appeal, until December 6, Respondent permitted Mirable to seek work through its exclusive job referral system. Mirable was in fact referred to employment on several occasions during the fall of 1979. Respondent also accepted the tender of dues by Mirable in October and November. However, by letter dated November 30, the International notified Respondent that since Mirable was fined $1,000 "and expelled by Local 112, it will be necessary for him to pay his fine and to receive clearance from Local 112 before he can be reinstated and dues accepted." On December 18, Raymond Fleck, Respondent's financial secretary-treasurer, sent Mirable a check for $204 as reimbursement of the November dues, reinstatement, and appeal fees and advised Mirable that "Local 13 cannot accept your dues until you receive clearance from Local 112." Thereafter, no dues were accepted.

2. Refusal to refer through hiring hall

On December 3, Mirable was referred through Respondent's exclusive job referral system to a job for Hawthorne Sheet Metal, an employer-member of the Association. The job for Hawthorne lasted about a day and a half. On December 6, Mirable returned to Respondent's hall to seek work. Mirable credibly testified that George Murray, Respondent's business manager, told him that he "couldn't sign the book no more."[2] Mirable credibly testified, as follows:

> Q. Did Murray tell you why you couldn't be referred to work?
>
> A. Yes, because you're not a member no more.
>
> Q. Did you sign in that day?
>
> A. No. I wasn't allowed to sign in. Only . . . if you're in the union you can sign in.

Mirable testified that during the next several months he kept on coming to the hall, asking for work. He testified that both Murray and William Voitle, Respondent's business agent, repeatedly told him "because I have no card, you can't work out of the hall." Mirable's testimony was corroborated by Paul Schachter, Mirable's attorney and one of his witnesses. Schachter testified that Mirable came to him in March 1980 with respect to his not being referred by Respondent. Schachter credibly testified as follows:

> Q. So what did you do?
>
> A. After doing some preliminary investigation of the facts of the case I called up Local 13 and I spoke to George Murray concerning the status of Mr. Mirable.
>
> Q. When was this conversation?
>
> A. This was on March 11th.
>
> Q. And what was said in the conversation?
>
> A. I told Mr. Murray—I identified myself. I said I'm Paul Schachter, Director of the Labor Law Clinic; we're trying to assist Mr. Mirable in getting reinstated to his job so that he could be again referred out from the hiring hall since he was not being referred out at the instant time . . . . and Mr.

[1] All dates refer to 1979 unless otherwise specified.

[2] Inasmuch as the events of December 6 occurred prior to the 10(b) period, I am not finding any violation of the Act based on such events. However, "earlier events may be utilized to shed light on the true character of matters occurring within the limitations period; and for that purpose 10(b) ordinarily does not bar such evidentiary use of anterior events." *Local Lodge No. 1424, International Association of Machinists, AFL-CIO, et al.* v. *N.L.R.B.*, 362 U.S. 411, 416 (1960).

> Murray told me that they had no objection to reinstating Mr. Mirable. The problem was, however, that they had to get clearance from Owen Jones at Local 112 in upstate New York.
>
> I asked Mr. Murray if Mr. Mirable would be referred out to jobs pending getting the clearance from . . . Mr. Jones, since . . . Mr. Mirable had already paid the fine.
>
> Mr. Murray told me that as soon as Mr. Mirable was reinstated to the union, he would be able to be referred out for jobs again.
>
> Q. Did Murray say anything further in the conversation? He said that as soon as Mr Mirable was reinstated he could be referred out from the hall at Local 13.
>
> Q. Did Murray say anything further?
>
> A. Yes. When I asked Mr. Murray if Mr. Mirable could be referred pending his reinstatement into the union, the answer was that only—he would have to be in the union because only union people could be referred from the hall.

Schachter also testified with respect to a further conversation he had with Murray towards the latter part of April 1980. Schachter inquired of Murray whether Mirable's application for reinstatement was being processed, to which Murray replied in the affirmative. Schachter credibly testified as follows:

> I asked Mr. Murray if Mr. Mirable would be referred out to jobs now that the application was being processed. Mr. Murray said, no, that he would not be referred out to jobs until he was reinstated into the union, which he expected to be shortly.

While Murray denied that he told Mirable that he could not sign the out-of-work list, he admitted that he told Mirable "you have to pay the fine or I'm not able to send you to work." Murray also testified that when Mirable finished the Hawthorne job he came to the hall but "didn't sign an out-of-work sheet, and he didn't sign the book."

I credit Mirable's testimony that Murray and Voitle told him "because I have no card, you can't work out of the hall." This testimony, in effect, was corroborated by Schachter who credibly testified that Murray told him that only union people would be referred from the hiring hall and that Mirable would not be referred again until he was reinstated into membership. Murray virtually conceded this when he testified that he told Mirable that "you have to pay the fine or I'm not able to send you to work." With respect to Murray's testimony that Mirable appeared at the hall after the Hawthorne job but did not sign the book, it is inconceivable that Mirable would voluntarily not have signed the book. Murray testified that under the hiring hall procedure, when an individual reports out of work "he comes into the union office and we have slips of paper on the desk in a box and he signs in the paper and he signs his name." He also testified that this procedure is something that the members "automatically" follow. Inasmuch as Mirable had finished the Hawthorne job and was out of work, it is incredible that he would have appeared at the hall and, on his own volition, not have signed the out-of-work list. The evidence instead clearly points to the credibility of Mirable's statement that he was instructed not to sign the out-of-work list.

Accordingly, I find that Mirable was told by Respondent that he could not sign the out-of-work list because he was not a member of Respondent. After December 30, this instruction was reaffirmed by Respondent's statements that because Mirable had no "card," he could not "work out of the hall." I find that commencing December 30[3] Mirable was not referred to jobs by Respondent through its hiring hall because he was not a member of Respondent.

3. Employment at Hudson Food

Mirable testified that he attended an executive board meeting of Respondent on April 21, 1980. While at the union office he met Peter Nigro, vice president of Hudson Food Service Equipment Company (Hudson), who offered him a job as a welder. Mirable felt that he could not take the job because he did not have a "card." Peter Nigro corroborated Mirable's testimony as to the job offer. He stated that he met Mirable at the union office on April 21. He testified as follows:

> Q. Would you tell the court the circumstances under which you met him, what had happened, how he was introduced to you and so forth?
>
> A. I just met him in the outer offices there and I asked him if he was a sheet metal worker and he said yes and I asked him if he was working. He said no. I asked him if he wanted to work with us. I needed at that time a man in the shop to do sinks and dish tables.

Joseph Nigro, president of Hudson, testified that Mirable first came to work on June 16, 1980. He testified that he called either Murray or Voitle who told him that Mirable "could work." However, Nigro testified that he could not have sent Mirable to do "outside" work without a union card.

Based upon the testimony of Mirable, Peter Nigro, and Joseph Nigro, I find that Mirable was offered a job with Hudson on April 21, 1980. However, this job was not referred by Respondent through the hiring hall. Instead, Mirable happened to meet Peter Nigro at the union office. After finding out that Mirable was a welder, Nigro offered him a job. I conclude that the job offer was not a referral by Respondent through its hiring hall.

4. Reinstatement fee

Mirable testified that Fleck invited him to come to an executive board meeting on April 21, 1980. At that time he was told that he would have to pay the sum of $395 to be reinstated to membership in Respondent. Mirable testified that that night Fleck handed him General Counsel's Exhibit 3(b) which itemizes the total of $395 as fol-

[3] While the practice of nonreferral began on December 6, as pointed out above, inasmuch as December 6 antedates the 10(b) period, no violation is being found for events occurring prior to December 30.

lows: $296—"8 months back dues" for October 1979–May 1980; $25—"reinstatement fee"; and $74—"June & July dues." Mirable testified that he paid the $395 on June 24, 1980.[4] Fleck did not deny Mirable's version of the events.

I credit Mirable's testimony which essentially is uncontroverted and I find that Respondent required Mirable to pay a fee of $395 as a condition precedent to being reinstated into membership in Respondent. I find that the $395 fee consisted of $296 back dues for the period October 1979 to May 1980; $25 reinstatement fee; and $74 as dues for June and July 1980.

C. *Discussion and Analysis*

1. Refusal to refer

The law is well settled that a union violates Section 8(b)(1)(A) and (2) of the Act when, under an exclusive hiring-hall agreement with an employer, it accords its own members preference in job referrals over nonmembers using its hiring hall facilities. *Local 357, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America* [*Los Angeles-Seattle Motor Express*] v. *N.L.R.B.*, 365 U.S. 667, 674–675 (1961); *N.L.R.B.* v. *Local 269, International Brotherhood of Electrical Workers, AFL–CIO, and Mercer County Division, New Jersey Chapter, National Electrical Contractors Association* 357 F.2d 51, 55 (3d Cir. 1966). As the Board has stated in *Sachs Electric Company*, 248 NLRB 669, 670 (1980).

> The operation of a union hiring hall imposes considerable responsibilities on the union agents in charge of the hall. Thus, they must neither foster nor countenance discrimination with regard to access to, or referral from, the hall on the basis of International union membership, local union membership, or any other arbitrary, invidious, or irrelevant considerations.

Respondent concedes that if in fact Mirable was discriminated against because of his not being a member in Respondent, such discrimination constitutes a violation of the Act.[5] I have found that in early December Respondent was notified by the International that it could no longer accept dues from Mirable. Soon thereafter, Mirable was told he could no longer "sign in" and was thereafter not referred to jobs from the hiring hall. These findings are based upon Mirable's credible testimony which was corroborated by the testimony of Schachter. Indeed, Murray himself testified that he told Mirable "you have to pay the fine or I'm not able to send you to work."

I further find that the discrimination continued until June 24, 1980. While Mirable was offered a job with Hudson in April 1980 this was not pursuant to a referral through Respondent's hiring hall.

Accordingy, I find that from December 30, 1979, until June 24, 1980, Respondent refused to refer Mirable to jobs from its hiring hall because Mirable was not a member of Respondent in violation of Section 8(b)(1)(A) and (2) of the Act.

2. Reinstatement fee

An applicant cannot be required to pay back dues for a period when dues were not validly required as a condition of employment. *Bricklayers', Local No. 8, supra*, 235 NLRB at 1005. I have found that Mirable was not offered work through Respondent's hiring hall from December 30, 1979, until June 24, 1980. I have further found that on June 24, 1980, Respondent demanded, and Mirable paid, the sum of $296 as back dues for the period of October 1979 through May 1980.

Respondent argues that the money requested constituted a "reinitiation" fee. However, the record does not support a finding that Mirable was asked for a "reinitiation" fee. On the contrary, General Counsel Exhibit's 3(b), which was handed to Mirable on June 24, 1980, specifically states the $296 as "8 months back dues." The "reinstatement fee" is specifically stated to be $25.

Accordingly, I find that Respondent's requirement that Mirable pay back dues for the period of December 30, 1979, to June 24, 1980, violates Section 8(b)(1)(A) and (2) of the Act. See *United Brotherhood of Carpenters and Joiners of America, East Pennsylvania Industrial District Council, AFL–CIO (Ridge Homes, a Division of Evans Products Co., Inc.)* 224 NLRB 1144, 1148 (1976).

CONCLUSIONS OF LAW

1. The Association is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Respondent is a labor organization within the meaning of Section 2(5) of the Act.

3. By refusing to refer Mirable to employment through its hiring hall from December 30, 1979, to June 24, 1980, because Mirable was not a member of Respondent, Respondent has violated Section 8(b)(1)(A) and (2) of the Act.

4. By requiring Mirable to pay back dues for the period of December 30, 1979, to June 24, 1980, as a condition precedent to Mirable's reinstatement to membership and referral through the hiring hall, Respondent has violated Section 8(b)(1)(A) and (2) of the Act.

5. The aforesaid unfair labor practices constitute unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

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[4] Mirable credibly testified that he gave Fleck $400 and received change so that the total paid was "three ninety something." While the record contains a receipt for $99, which appears to include $25 as reinstatement fee and $74 for June and July dues, I credit Mirable's testimony that he in fact paid an additional $296, for a total of $395.

[5] Respondent adduced testimony to show that during the winter months a number of employees were out of work. In the first place, Respondent has not shown that jobs were unavailable. In fact, Voitle conceded that "Mirable would have had no problem getting a kitchen equipment job if he had signed the list between December of 1979 and July of 1980." More importantly, however, the Board has held that where a union refuses to refer an applicant because of improper union considerations, the General Counsel need not prove that jobs were available at the time of the request for referral. *Bricklayers' and Stonemasons' International Union, Local No. 8, B.M. & P.I.U. of America (California Conference of Mason Contractor Associations, Inc.)*, 235 NLRB 1001, 1005 (1978).

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take affirmative action designed to effectuate the policies of the Act.

Respondent having refused to refer Mirable to employment through its hiring hall from December 30, 1979, to June 24, 1980, I shall order Respondent to make Mirable whole for any loss of earnings he may have suffered by not being referred to jobs during that period.

In addition, having found that Respondent unlawfully required Mirable to pay back dues as a condition precedent to his reinstatement into membership and referral through the hiring hall, I shall order Respondent to reimburse him for the amount of back dues paid for the period of December 30, 1979, to June 24, 1980.[6]

Backpay shall be computed in accordance with the formula approved in *F. W. Woolworth Company*, 90 NLRB 289 (1950). Interest shall be computed in the manner prescribed in *Florida Steel Corporation*, 231 NLRB 651 (1977).[7]

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[8]

The Respondent, Sheet Metal Workers International Association, Local Union No. 13, AFL-CIO, Union, New Jersey, its officers, agents, and representatives, shall:

1. Cease and desist from:

(a) Refusing to refer nonmembers to jobs through its exclusive hiring hall.

(b) Demanding the payment of back dues for periods when dues were not validly required as a condition of employment, as a requirement for reinstatement into membership and referral through the hiring hall.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Make whole Paul Mirable for any loss of earnings he may have suffered as a result of Respondent's refusal to refer him to work, in the manner set forth above in the section entitled "The Remedy."

(b) Reimburse Mirable for back dues which he was required to pay for the period December 30, 1979, to June 24, 1980, plus interest, in the manner set forth above in the section entitled "The Remedy."

(c) Post at its offices, meeting halls, and hiring halls, copies of the attached notice marked "Appendix."[9] Copies of the notice, on forms provided by the Regional Director for Region 22, after being duly signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by Respondent to insure that the notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 22, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

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[6] Counsel for Mirable urges that I order Respondent to reimburse the $1,000 fine which Mirable paid to Respondent for transmittal to Local 112. At the hearing, counsel for Mirable moved to amend the complaint to include an allegation that Mirable was required to pay the $1,000 fine. Counsel for the General Counsel and Respondent objected to the motion. Pursuant to *GTE Automatic Electric, Inc.*, 196 NLRB 902 (1972), I denied the motion to amend. Accordingly, inasmuch as the matter of the fine was not litigated in this proceeding, I cannot order the relief requested by the Charging Party.

[7] See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716, 717-721 (1962).

[8] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[9] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."